

September 19, 2019

The Honorable Judge Bianco
U.S. District Court – EDNY
100 Federal Plaza
Central Islip, NY 11722

Your Honor,

After learning of Constantine's supplemental *28 U.S.C. 2255* submission, Kenner informed the Court during the September 5, 2019 hearing that he was joining in Constantine's motion.

Kenner has also been informed that the government opposition ([Document 712](#)) refutes the significance of the text message evidence that was apparently never turned over by the government to Constantine pre-trial (or used by Kenner's ineffective counsel – [see Document 675 at 109-110](#)).

As a result of the government's ongoing misrepresentations about the empirical evidence, fully exposing the irrefutable transparency between the GSF contributors and the defendants (individually or in concert), Kenner has filed this supplemental brief for the Court, addressing the specific and related issues. In a case prosecuted on "concealment" claims by the government, ineffective assistance of counsel related to mutually alleged issues does not just effect one (1) defendant, but rather effects the integrity of the defenses.¹

The government wants the Court to ignore purely contravening evidence. They, instead, want the Court to believe that the partial memory of only five (5) of the fifteen (15) Global Settlement Fund contributors is the cause for criminal concealment; while they all had unencumbered access to Ronald Richards ([Ex.6](#)).² Please note that the government put a full-pressed ambush on every Kenner investor over the last two (2) decades (totaling nearly 100) from 2009 thru 2015

¹ Prior to trial and at least once during trial, attorneys for defendant Constantine mutually

² The government continues to incorrectly claim that only \$225,000 of the GSF funds Constantine collected were used for lawsuits versus Jowdy, when approximately \$474,500 was used for the various attorneys in the Jowdy cases (California, Arizona, and Mexico), and approximately \$104,000 **more** was spent on related Jowdy cabal and "bad apple" cases (as Tyson Nash verified at trial – [Tr.1919-1921](#)).

and could only persuade a subset of GSF contributors (and Hawai'i or Eufora) investors that "something" happened that they were never told; *in spite of their individual and previous affirmations "under oath" of the exact same fact patterns.*³

Cumulative...?

The government's defense to the lack of *Brady*-production to Constantine (fully effecting the entire conspiratorial defense) is that the texts were cumulative. Perhaps, it is the most inane position to take; *effectively conceding their wrongdoings.*

The McKee texts ([See Document 675 at 108-111](#)), confirm without equivocation that he had 100% awareness of the use of funds in Constantine's GSF plan, *prior* to his contribution; inapposite his complete "memory loss" testimony ([Tr.1820-24](#)) six (6) years later. Defendant Kenner accepts the government's surrender on that point, confirming that "cumulative", as the government espouses, vindicates the defendants; and certainly eliminates McKee as a victim of anything (his only "object" involvement in the instant case – [Tr.1846](#)).

³ The Court should note that the government spent six (6) years pre-trial – with the assistance of Jowdy and his attorneys, John Kaiser and Bryan Berard (once hired by Jowdy in 2011) to convince a minority subset of the alleged conspiratorial "objects" that something was wrong – and to participate as victims *of what they cannot remember*; two (2) of which are the same in all three "objects" in spite of *independent* legal representation in each transaction (with Michael Peca re-canting his alleged "no knowledge" under cross-examination pressures and his exculpatory 2011 SDNY Grand Jury testimony – [Document 501 at 9](#)).

- **GSF** – only five (5) of the 15 contributors are alleged victims (33%), and
- **Hawai'i** – only six (6) of the 26 contributors are alleged victims (23%), and
- **Eufora private stock sales** -- only five (5) of the 30+ Eufora investors ([Ex.7 at 9-18](#)) are alleged victims (<16%).

For years, the Court knows that the investors/contributors to each of these "objects" had their own independent attorneys. The government has also ignored, to their benefit that the entire investor group routinely interacted with each other; further distancing any potential concealment between best friends and teammates at any time. As an example, Michael Peca and Owen Nolan were roommates during the 2002 Olympics ([Tr.431-432](#)) and had unfettered communication between them during the entire period of the alleged crimes; including Nolan's divergent support of Jowdy from 2008 thru present and subsequent settlement agreement – ultimately eliminating Nolan as a victim of anything in the instant case (notwithstanding double collecting in contradiction to the *Mandatory Victims Restitution Act* guidelines).

The evidence cannot be cumulative to defend their *Brady*-production violation and at the same time inapposite of transparent text communication directly between the parties, thus fully lacking concealment under any definition. Their argument fails.

The Court should also note that McKee told the Court in 2015 that he spoke with his “teammate” in 2009 prior to contributing to Constantine's plan ([Tr.1817](#)). Michael Peca was the only teammate that McKee had who was ever involved in the GSF efforts, thus whatever McKee knew (pursuant to his own texts), Michael Peca had fully unfettered access to the McKee information (to compare and contrast the Peca meeting that took place less than 24 hours prior), before Peca and his wife independently exchanged texts and emails with Kenner and Constantine about the various other elements of the plan and their “take” from buying out the “bad apples” (or “black sheep” as juxtaposed by McKee via text).

Show Me A Businessman And I Will Find You A Crime...

Former U.S. Attorney for the State of Utah, Brett Tolman: *“Give me the executives of any company and I could prosecute them for a federal crime”*.⁴

The government sought prosecution under the guise that *“if you throw enough mud at a white shirt, you will eventually be able to make it look dirty”*. The government's strategy employed a six (6) year onslaught of coordinated media campaigns (NY Daily News and Fortune Magazine, supported by FBI leaks), FBI pressures of Kenner wrongdoings directly espoused to the investors (without the presentation of any documented thefts), and the Jowdy-led ambushade by his attorneys and “paid-for” advocates (Attorney Tom Harvey, John Kaiser and Bryan Berard). The Court cannot overlook the coincidence that after Jowdy's cabal and Galioto “used” John Kaiser for what they needed (i.e. outrageous trial testimony in contradiction to everything he ever testified to, proffered to the FBI, surreptitiously recorded, or his-own actual evidence), they fired him. Jowdy and Harvey fired Kaiser once he re-confirmed from the inside of Jowdy's cabal that Jowdy had robbed everyone (just like Kenner told the FBI ten [10] years earlier during his June 24, 2009 proffer). Kaiser reported it to this Court ([Document 628](#)), re-confirming the government's forensic confirmations after trial ([government-forfeiture-36](#) and [government-forfeiture-44](#)) – but the FBI will not talk to him now; raising a myriad of protectionism issues laughed at as conspiracy by the prosecutorial team ([Tr.5047-5052](#)) but re-affirmed by the FBI's former “golden-boy”. To the defendants' degradation, Kaiser had

⁴ [Kenner sentencing memo at 43-44](#).

already played the lead role for them in synchronized testimony as an alleged “insider”.⁵

The Global Settlement Fund...

Not one of the contributors to the GSF, specifically including Kenner, are pleased with the results of the group decision of having proceeded under Constantine's lead, but the revelation of the “*Constantine-Gonchar side-deal*” refutes all “misuse” arguments by the government without equivocation, with every investor granting full authorization for the diverse uses Constantine followed. See *Horvath v. Banco Comercial Portugues, S.A. and Millennium BCP Bank, N.A.*, 461 Fed. Appx. 61; 2012 U.S. App. LEXIS 3012.⁶

⁵ The Court has noted thru Kenner's post-trial submissions that the Kaiser testimonial “lead role” status received the “blind eye” recompense from the FBI for his *allowed* thefts from Kenner in their Arizona renovation project, their Sag Harbor real estate transaction, years of unpaid IRS issues (in violation of his NY State Disability pension) and Mexico employment wages; in addition to his now documented thefts from his mother (Ethel), handi-capped brother, DEA agent Bob Rizzi, Long Island doctors Frank Sconzo and Willy Krueger, and 9-11 First Responder Vincent Tesoriero; amongst others unrelated to Kenner (all who are still unaware to this day) (documented thru FBI 302(b) notes).

⁶ **Tyson Nash** (*Tr.1919-22, 1944, 1989-90, 2003*) and **Kenner** (*Tr.4925-26*) gave testimony during the trial to verify the “*bad apples*” (Nolan, Juneau, Moreau and Myrick) that were being extracted from the group's investment deals – utilizing the GSF as the signed-off authorizations (and pre-cursor) emails all verified in detail [*Ex.1a* -- Peca] [*Ex.2a* – McKee].

The hi-light of the Constantine's addendum...

The “bad apples” testimony was further corroborated by **Jay McKee's** 2009 text communication with Kenner confirming *McKee knew 100% of the GSF uses* – including the “*black sheep*” (*See Document 668: Kenner Rule 29-33 Reconsideration Motion Appendix at 49-50*) – and he spoke to **Michael Peca** about it *before* both of them agreed to contribute to the GSF – and **signed off** (*See Bates stamp: SMC-000015* [Kristen Peca] [*Ex.3*], *See Bates stamp: SMC-000018* [Jay McKee] [*Ex.4*], and *See Bates stamp: ED-002051 and BX20-SD-000075* [Michael Peca] [*Ex.5*]).

- In *Horvath*, the investor argued that the terms and conditions were written in Portuguese, which he did not understand, but the court of appeals found that the investor was charged with knowing and understanding the contents of the documents that he signed.
- The Court opined “If the signer can read the instrument, not to have read it is gross negligence; if he cannot read it, not to procure it to be read is equally negligent; in either case the writing binds him. Parties are bound by documents expressly incorporated by reference into agreements to which they manifest their assent.”

Misuse of prosecutorial time...

The government utilized approximately a dozen witnesses at trial to verify transactions paid out of the Constantine-controlled GSF fund, when they were 100% aware that the funds that Gonchar ([Tr.5459-5460](#)) and Constantine (9-8-2009 -- \$124,985) deposited into Ronald Richards' Trust account -- and were explicitly for Constantine's unencumbered use ([Tr.4826-27](#)). The Court knows that Gonchar also contributed approximately \$1,250,000 additional funds to his "side-deal" with Constantine (\$749,985 on 9-9-09, \$362,355.58 on 11-6-09, and \$138,000 on 11-30-09).⁷

Regardless of the government's mis-represented position of the Constantine "use of funds" (with distributions fully supported by his signed-emails authorizations), there are no specific benefits to Kenner that the government can present as a fraud.

- This echoes the identical problem they face with the **Hawai'i partners** transactions with Constantine and Jowdy. Kenner received *NO BENEFITS* from their corporate authorized transactions. The Court must note that from 2002-2006, Kenner did not take a developer fee from the project despite his Managing Member status and 24-7 time commitments. *What financial conspiracy was Kenner involved in with available funds not tapped? It defies any basic criminal logic...*
- In contrast, once the Lehman Brothers funding began (August 2006), the new joint venture developer received a *\$109,000 monthly payment*. As a 3rd party authorized fee, Kenner certainly would have been entitled to some "subset" at a minimum of those dollars. *Kenner took zero of the authorization funds.*
- The government also verified to the EDNY Court in 2018 that Jowdy was receiving a *\$220,000 per month developer fee in Cabo at Diamante*. During the May 14, 2019 hearing in front of Magistrate Shields – most likely hoping that Your Honor would not read their altered claims...the government asserted ([Tr.37](#)):

[Ms. O'Connor]: *"Your Honor, the government does have certain concerns that it's being run by Jowdy, who is somebody that the government feels is an unindicted co-conspirator."*

⁷ The Court should note that after the "side-deal" was illuminated by the Constantine defense ([Tr.5460](#)) (although always known to the government and *ignored* to facilitate the illusion that approximately 12 payees received funds from Constantine erroneously as a criminal act by him), they still doubled-down that funds (covered by the side-deal) were still "diverted criminally".

- Kenner received ZERO developer funds or salary...and at the 2006 closing, other than expenses Kenner fronted to the various law firms and closing entities, Kenner received NONE of his capital account funds; unlike every other Hawai'i partners investor.
- Kenner is currently "out" his entire \$750,000-plus capital account; until he is released and can resume litigation efforts on behalf of Little Isle 4 to sue Jowdy and others responsible for the recovery of the funds to Little Isle 4 and Na'alehu Ventures 2006 (government-forfeiture-44) that the government refuses to assist; wholly dumbfounding Kenner and Kenner investors (See Document 652).

The best the government could produce to allege "Kenner thefts" was their underlying lies that "Kenner stole your Hawai'i money to buy his interest in the Cabo project" (See Kenner Sentencing Memo at 20-21):

[Tr.5721 – Michiewicz summation]:

"And what do you find out [about the Jowdy loan]? You find out, what did that 5 million or however much more or less that netted out to be, what did it buy Mr. Kenner? It bought him a 39 percent interest in Ken Jowdy's Cabo San Lucas. Didn't buy the players a 39 percent interest. Him. To this day, right now, he is a partner in that resort. That's where the money went. That's what it bought him. And on the backs, on the portfolios, of the hockey players."

[Tr.5722-5723 – Michiewicz summation]:

"And if you look at the Centrum loan, I can not think of a more perfect example of proof beyond a reasonable doubt -- actions speak louder than words -- no reason to mortgage Honu'apo parcel. No reason other than for Kenner to get his 39 percent. To get his piece of the pie, that resort in Cabo. No reason. Actions speak louder than words. And in this case the action is pure fraud."

And – [Tr.5990 – Komatiredy rebuttal summation]:

"...you know what, Baja Development Corporation, on that chart, but there is some sort of misconduct; you don't know what the money was for. You know exactly what the money was for. In fact, Mr. LaRusso, when the first witness got on the stand, one of his first exhibits he entered into evidence was a record of the Baja Development Corporation. Those records are in evidence. Mr. Kenner told you that he used that money to get his piece in the Mexico investment with Ken Jowdy. You know exactly what that's for. That's in evidence."

And – [Tr.5996 – Komatiredy rebuttal summation]:

"He [Kenner] used it for personal use to get an interest in that resort in Cabo."

In spite of the government's wishes and desires, none of this was true. Their-own post-trial forensic accounting proved it (*See government-forfeiture-36 and government-forfeiture-44*). Nevertheless, the government refuses to alert the court to their defamatory and false statements, only further embarrassed by fabricating that Kenner was "*broke*" to project some criminal desperation that did not exist, ever, with Kenner (*Tr.5982*) [*Komatiredy*]:

"Mr. Haley said, you know, you can't just take a snapshot of someone's bank account and say it's fraud. Actually, with this one you can take a snapshot, and I'll tell you why. Special Agent Wayne and Forensic Accountant Petrellese told you why. Because when you look at that bank account, the balance is zero or negative before the investors' money comes in. Kenner is broke. He is entirely living off of his clients' money. He's entirely living off of his fraud. That's why you can take a snapshot, because there's no other money coming in."

But -- this gross mis-representation defies logic.

- **Kenner has never been broke – certainly not while the U.S. government is trying to forfeit a \$100 million-plus LLC in Mexico, and**
- The government *has* the Kenner bank records that show over \$1 million between Kenner's other accounts (the ones that were not subpoenaed and closed by the FBI money laundering allegations four (4) years before the Kenner indictment), and
- The government knew Jowdy owed Kenner over \$1 million at the time, and
- **The government "expert" did not tell you that Kenner was broke or that Kenner was entirely living off his clients money; ever, and**
- The government knew that Kenner had to transfer the remaining balance from the Wells Fargo account to his Bank of America accounts (because of the FBI subpoena)...
 - *That is why the account had a ZERO BALANCE, and*
- The government knew that Kenner's consulting business grossed over \$800,000 between 2008 and 2009 – so there was plenty of money coming in...
 - Yet -- *none* of these government's misleading summation statements were based in anything proven at trial.⁸

⁸ Assuming Kenner never received the second (2nd) 1-TB drive that the government letter claims it gave attorney Chavis in 2014 (*Document ## illegible*), the government never gave

The Government's Specific Misrepresentations To The Court...

Lack of critical cross-examination...

There was no point in time that vigorous cross-examination occurred with Kenner's trial counsel, as the government proclaims in their opposition memo. Consistently, and argued in Kenner's 28 U.S.C. 2255 motion ([Document 675](#)), exculpatory and impeaching cross-examination evidence was in the courtroom, at the availability of the defense, and Kenner's trial counsel *refused* to admit; including but not limited to the "[ink](#)" versions of the alleged Kaiser forgeries that were recovered from Kaiser's-own home on the eve of trial... **but *never* admitted into evidence thru their-own signature expert.** The blue "[ink](#)" versions, in Kaiser's possession for nearly a decade pre-trial, clearly conclude every evidentiary malfeasance by the government into this solitary issue, claiming that "somehow" Kaiser had the original signatures in his possession – *BUT they were forged by someone else unknown to Kaiser*. Because no trier of fact would believe that far-fetched fact, the government, in turn, chose to *only* admit the photocopies seized at Kenner's home-office specifically as one would expect to find in the corporate records ([Tr.990-992](#) and [GX-5104](#)).

- The presentation of the documents the government labeled for trial, as [GX-7004](#) and [GX-7005](#) were deceptively *not* admitted, to avoid the obvious truth. The government knew that the admission of the *source* and *location* of the "[ink](#)" document recovery would have sunk their ruse (after Kenner exposed the government's other two [2] pre-trial forgery ruses).

Witness badgering over frivolous facts and circumstances is not the replacement for specific evidentiary cross-examination with wholly impeaching evidence available to debunk known-*false* and *not* provable government theories; and not utilized at all.

McKee's GSF exculpatory texts never exposed...

Neither McKee nor Kenner testified about the McKee texts that the government claims as fully considered evidence – which completely exposed the McKee amnesia (or CTE) symptoms. Again, trial counsel refused to admit them, claiming that the fact McKee sent the authorization email back to Constantine ([Tr.1818-19](#) and [GX-6602](#)), the jury knew McKee was lying about his full, unfettered knowledge ([Tr.1819-](#)

Constantine the same Kenner laptop information; further thrusting unresolved *Brady* issues on this Court.

1824) – and more impeaching testimony would “somehow according to trial counsel” turn the jury against Kenner as the defendant. Apparently that was not true, if the government still advocates for McKee as a victim of the GSF (his only “object” involvement in the instant case), specifically in the face of his exculpatory and full disclosure text communication with Kenner; verifying 100% of the GSF usages and McKee unencumbered knowledge (*See Document 668 – Appendix at 49-51*).

Nash fully verified the GSF multi-faceted Constantine strategy...

The Court should note that Tyson Nash testified (*Tr.1919-1921, 2003, 2045-46*) about every one of the uses of the GSF, as utilized by Constantine exclusively and verified by attorney Ronald Richards’s testimony (*Tr.3805-3816*); while nothing was concealed per the follow-up authorization (returned as acknowledged by each contributor -- *GX-6602*) and follow-up emails (in Rule 16 discovery – attachments *Ex.1* [Peca] and *Ex.2* [McKee]) further hi-lighting the details of the Constantine discussions with the contributors. Nash gave specific testimony, as follows (*Tr.1921*):

Q. Just to be clear, what was your understanding of where you would be getting this percentage from in these other things?

A [Nash]: My understanding was that we would be buying those other guys out with cash from the Global Settlement Fund and getting whatever percentages they owned divvied up between the group that funded the Global Settlement Fund.

In spite of Nash’s complete recollection of the GSF set-up meeting with Constantine, he could not recall the series of Constantine conference calls to discuss the ongoing use of funds and progress under Constantine (*Tr.2004*); identical to Michael Peca (*Tr.592-597*). The Court should also note that both Michael Peca (*Tr.540*) and Tyson Nash (*3500-TN-3 at deposition pg.12*) were asked directly what involvement Kenner had in the GSF, to which they specifically responded, “none”. Attorney Ronald Richards verified this as well throughout his entire testimony (*Tr.3805-3816*)

Kristen Peca previously affirmed the multi-faceted strategy of Constantine...

The government also was deftly aware that in their first 2014 pre-trial exculpatory “dump” identified as “*BINDER-###*” they informed defense counsel they were planning to use Kristen Peca’s email recap of the GSF (*Bates stamp: BINDER494-494.A*). The recap specifically hi-lights the expectations that her husband’s money would be part and parcel to the acquisition of the “buy out” portions of the “bad

apples" (*Tr.1919-20 [Nash], 1989-90 [Nash], 2003 [Nash]*) (*See Document 668 – Appendix at 49-51 [McKee]*).

Kristen Peca emailed Kenner, her specific understanding, as follows (*2-full-years* after the GSF meeting in Ohio) (*Ex.8*):

"We had an informal meeting in our living room...about your plan, the Global Settlement Fund in which each Jowdy lawsuit participant had to give an additional \$250,000 in exchange for additional ownership % in Euphora [sic], legal fees and other misc. items."

*..."the Global Settlement fund would not only help with legal fees, but would give us additional % of Euphora [sic] ownership as some of the settlement was to **buy out** Nolan, Juneau, Moreau of their Euphora [sic] %."*

Clearly, Michael Peca and Kristen Peca were aware of the multi-faceted GSF as Constantine proposed. Kristen Peca replied to the authorization email for the GSF (which she and her husband independently returned to Constantine, as follows on May 18, 2019) (*Ex.1a*):

"Hey, before we sign off on an "approved" letter, can we please have the written documentation to exactly how much (%) we obtained with our contribution?"

Both Peca's signed off independently (*Ex.3* and *Ex.5 – over a week later*). Thus, they both received answers to the exact question(s) they were requesting answers to -- and the resulting satisfactory paperwork from Constantine. Michael Peca even followed-up immediately after the meeting a week before he sent his "signed" email authorization:

7042	+171637432 34 Michael Peca*	5/9/2009 2:04:59 PM(UTC+0)	Read	Make sure I get a statement of somekind to where my \$250k is going. How much in ea of the two companies. Thanks
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This response clearly demonstrated that she and her husband reviewed the details of the authorization letter and had every, real time, opportunity to reply to its contents, and did as they needed clarity. Constantine emailed the Pecas a full disclosure letter, separate and apart from the authorization email stating, in part (*Ex.6*):

"The attached excel spreadsheet shows your current ownership interest that we are acquiring from the three [bad apples] of them as part of the settlement."

... "Avalon Airpark project. We are buying out their 20%, so you will also receive 1/10th of this interest (2%)."

Amazingly, the government allowed Kristen Peca to claim at trial that she and her husband wanted nothing to do with investments any longer, contradicting her and her husband's real time communication (*Tr.717-718*). The Court should note that less than one (1) year later after the alleged "no more investments" mantra, Michael Peca demanded to be a large contributor to the Eufora debt buyout or there would be a "lynching" (*See Document 668 Appendix at 100-102*). The buy out was led by Attorney Michael Stolper (*Ex.7*), Berard (*Tr.3106, 3111*), Kaiser (*Tr.1362-63*), Peca (*Tr.609*), Gaarn (*Tr.2640*) and Kenner [none of which *other than Kenner* (*Tr.4369* and *Ex.7 at 3*)⁹ could remember it by the time of the 2015 trial].

- The voluminous text communication, *apparently absent from Constantine's defense team*, illuminated the vast "Eufora buy out planning" by the investors (*See Document 668 Appendix at 368-378*), a plethora of impeachment evidence for the synchronized denials.

Sadly, the government extended the fabrications to an issue (the Eufora buy out) that had no perceived relevance to the criminal case (perhaps other than their "pump-and-dump claims)...but -- the government clearly prepped their witnesses to "remember what to forget" in unison (again). Stolper's July 16, 2010 letter exonerates Kenner, with full disclosure of the 2008-2010 private stock sales issues, raised by Constantine himself. Not one Stolper-represented investor presented a single contradicting or complaining email or text after their attorneys' exculpatory letter that rejected any Kenner wrongdoings against his clients in light of the full Eufora investigation in 2010.

Without equivocation, the texts, withheld from Constantine's attorneys' pre-trial, would have provided tremendous impeachment folly for the defendants. The *Brady* issue cannot be resolved without wholly reformative measures by the Court.

⁹ The July 16, 2010 letter from Eufora investor's attorney, Michael Stolper, to the attorney for Eufora and Constantine was *signed off* by 27 Eufora related parties whom Stolper was representing (which did *not* include Kenner) (*Id. at 9-18*). *The letter specifically acknowledged the group effort to buy out the Eufora debt by the investors represented by Stolper in the July 16, 2010 letter (Id. at 3).*

- The Court must acknowledge that Constantine was free on bail during the trial, affording him and his defense team a virtual unlimited amount of witness-preparation time (to utilize incredible impeachment evidence) unlike Kenner whose trial attorney refused to meet with him during trial &/or on the weekends in between sessions and debate the efficacy of the overwhelming pro-Kenner empirical evidence; *overwhelmingly left unused due to ignorance*.

Kenner Tequila Ruse Extended Four (4) Years After Lacking Evidence In Spite Of The Government's Trial Promises To Provide It...

The government ([Document 712 at 2](#)) made false claims about using GSF funds to purchase a tequila company.

There was *never* a purchase or acquisition of any tequila company, ever, by Kenner or affiliated with Kenner.

- It was another ploy concocted by Kaiser and the government to taint the entire proceedings – without proof other than wild conjecture.

Yet, the government continues (4+ years after trial), in opposition to Constantine's addendum, to claim the GSF was “used” by Kenner to pay for “pet projects”. This never happened. The government constantly refers to their tequila “red herring” as the proof. Constantine's reply letter ([at 3](#)) references a tequila payment, *despite the fact that no payment was ever made; regardless if the Gonchar-Constantine side-deal would have covered the transaction (if real)*. The government continued to echo some ilk of Nixonian truth, without any empirical evidence.

- Two (2) payments were made from the GSF to Mexico attorneys representing the Hawai'i-Mexico investors versus Jowdy in the myriad of civil and criminal suits in Mexico (totaling \$107,000, far short of the million-plus Kenner personally paid from 2008-2013). The \$107,000 of payments had zero to do with any tequila company. In fact, the \$85,000 payment to attorney Carillo is 100% traceable to the Gonchar deposit on 11-6-09 as part of the Constantine-Gonchar side deal ([Tr.4826-27](#)) (the same day as the outbound transfer by Constantine to Carillo – [Tr.3815-16](#)); if that were even necessary. No proof of fraud was offered. The government could have subpoenaed either attorney to verify it, if it had any validity, *but they didn't*. They simply grandstanded to allege another fraud that *never* existed -- as if *they* knew it and the jury should accept their above reproach ethics.

The logistical impossibility...

The government promised the Court (*Tr.33*) “*Kenner used the victims' money fund a tequila company he was starting in Mexico.*” Yet, the government never produced a scintilla of evidence. No person in the superseding indictment who deposited GSF contributions is traceable to any portion of the tequila red herring. Yet, the government wants the Court to overlook the fact that the tequila shipments highlighted as a fraud by Kenner (*Tr.1074-75*) actually took place over a year *prior* to the transaction they deemed as “*used to buy Kenner's tequila company*”. **It is logistically impossible and irreconcilable.** Nevertheless, U.S. attorney Michiewicz:

“And we are going to later on trace that he bought this company, it was a tequila company, using his funds from the global settlement fund.”

- The government should be hoisted by their-own petard for this ongoing subterfuge.

With Kristen Peca on the stand, Michiewicz attempted to further reinforce some scheme to fund a tequila business, as follows (*Tr.726*):

Q: Did they say anything about using the money in the Global Settlement Fund to pay for a Tequila company that Mr. Kenner was starting in Mexico?

More production violations: Discovery withheld until presented at trial...

The government *never* produced the tequila bottle pre-trial (under Rule 16 production rules). The tequila Red Herring was alleged repeatedly by the government without any proof, in spite of the fact that **no funds were ever used for Kenner pet projects** (*Tr.33, 726, 1076 [Michiewicz lie to the Court], summation at 5752*):

[Michiewicz at *Tr.1075*]:

“And we are going to later on trace that he bought this company, it was a tequila company, using his funds from the global settlement fund.”

THE COURT: I think the allegation is, it went to the tequila company. Right?

MR. MISKIEWICZ: Yes.

MR. HALEY: Is the government's proffer that the money was wired directly into the tequila company account?

MR. MISKIEWICZ: Mr. Richards was handling all the disbursements out of the Ron Richards escrow account.

THE COURT: So it went from the Ron Richards account to another?

MR. MISKIEWICZ: To the tequila company account.

The government *never* traced anything illicit (even one year-plus out of order) – because *no funds* were ever “sent to a tequila company” or anything related to one.

Regardless, the government continued to “bang”, “sniff”, and present the tequila bottle as if there was something untoward they just did not want to say – but the truth of the alleged Red Herring fraud was “there” ...just under the surface of reality, for the jury to “**just accept**”.

- Unfortunately, without access to the texts by Constantine's attorneys pre-trial, they could not produce, *infra*, the Gaudet texts to confirm there was “**no there, there**”!

After *not* tracing any money to any alleged tequila company – AUSA Michiewicz still claimed that the fake bottle (manufactured by another tequila company – “Don Abraham”), was part of some stolen money during summation that they *never* traced to a bottle or company.¹⁰

Kenner never manufactured or produced a single bottle; ever. It was another Red Herring and straight fraud on the jury and the Court (*Tr.5752*):

[Michiewicz]: “Everything else, including Sergei Gonchar, 4 million, go basically to Kenner and Constantine expenses, including, you know, getting an interest in the Mosquito Rojo Tequila Company (indicating), and they find the agents testify they find a business card, Phil Kenner is the chairperson of this company, but no, no, no, I never possessed, it was never any manufacturing, there was never anything. Show him the e-mails that he sent to John Kaiser. Hey, here are the new Russian bottles, whatever that is. I don't know what to make of that testimony, photo shop?”

¹⁰ The distiller in Mexico is also the owner of **Don Abraham Tequila**. If the Court observes the Red Herring bottle from the courtroom (*GX-4509 at Tr.4728*), it is a **Don Abraham bottle** – including glass imprints of the **Don Abraham embossed name**, thus not a bottle manufactured for someone else's use – *specifically not Kenner's use*. The **neck of the bottle** also has the remnants of the heat sealed plastic wrapper on it – which also **bears the name Don Abraham**.

Finally, after I produced the bottle (indicating) and I don't know, I guess it's not a real bottle. You can have it. You can touch it. It's a real bottle."

- Clearly – the Don Abraham bottles in the picture were unlabeled (*GX-4508 at 2*) -- and not the bottle they produced in Court (*GX-4509*) – and not the bottles they alleged were the same from a preliminary website design (*GX-905*).

[Michiewicz]: "***I don't know what to make of that testimony***" ...which should have been accompanied by a resounding **NOTHING** – since the government had produced NO illicit transactions during the 9-week trial – or any transactions at all other than claiming that Kaiser had a friend who distributed liquor in Russia.

Kenner implores the Court to demand the fake tequila bottle (*GX-4509*) be presented by the government during the October 17, 2019 hearing to verify that the bottle is embossed with the *Don Abraham* moniker and the heat seal label around the bottle neck during the trial has *Don Abraham* printed on it (unless the government now removes the heat sealed label).

There will be no equivocation that the tequila red herring was a fraud on the court and Kenner was truthful (again) that he never manufactured a single bottle for any alleged tequila company; ever.

- *It was a straight deception to confuse the Court and jury.*

The government's introduction of evidence confirms (to Kenner's integrity) that the documents (*GX-304, 304T.1 and 304T.2*) were certificates needed for the Russian contact to receive the bottles (in Russia) that were sent directly from the distributor (Tequila Las Americas in Jalisco, Mexico – *GX-304 at 2*) to the Russian address previously provided by Kaiser (*GX-4507*) directly from the distributors address (per the application *at 6*); never illegally to John Kaiser in the United States (*Tr.1084*). That was a hoax. The government even verified it during their cross-examination of Kenner (*Tr.4726-27*).

- In spite of their own derailment, they continued with their ruse and prejudiced the defendants.

Kenner's project partner sent the following confirmation texts to Kenner about mailing the bottles directly to Russia without labels and using "*DA*" (*Don Abraham*) bottles, thus Michiewicz' summation lies were exposed again to fool the Court and jury; and left unchecked (without the production of the tens of thousands of Kenner texts to Constantine's defense team), *supra*.

Tequila -- Rojo bottles (no labels) shipped to Russia – NOT New York...

Kenner's text responses in RED

4170	+5262415159 95 Bobby Gaudet	10/22/2008 1:11:31 AM(UTC+0)	Sent	Did you arrange for the tequila shipments per johnny's email??
3436	+5262415159 95 Bobby Gaudet	10/22/2008 3:28:44 AM(UTC+0)	Read	Do we know what bottles/labels. Blanco ,rep, anj.
4173	+5262415159 95 Bobby Gaudet	10/22/2008 9:45:02 AM(UTC+0)	Sent	No labels. Just DA bottles with 3 of each...blanco, repo, & anèjo. Pk
3438	+5262415159 95 Bobby Gaudet	10/22/2008 9:49:21 AM(UTC+0)	Read	Bueno

AUSA Komatireddy doubled-down during rebuttal summation (*Tr.6002-6003*):

"Each of the other players came into this courtroom and told you in their words what they understood the Global Settlement Fund to be for. They told you what their understanding was, what they authorized, what they didn't authorize. They told you in no uncertain rules, Rucchin, Peca and all the rest, McKee, they told you that they did not authorize their money to be used for the defendants' pet projects or personal use."

- Again -- None of it was...

O'er, the government even tried to introduce the tequila company as a Red Herring at a side bar to the judge (*Tr.1074-76*):

MR. MISKIEWICZ: Your Honor, Government Exhibit 304 is an email from Mr. Kenner to John Kaiser. The subject matter says MosquitoRojoTequila. It is dated 25 August 6, 2008. There is a certificate from Mexico that represents that Mr. Kenner is the owner, or at least a representative, of this company. And we are going to later on trace that he bought this company, it was a tequila company, using his funds from the global settlement fund. And Mr. Kaiser will also say that he was given this because Mr. Kenner was seeking additional investors in

this tequila company and Mr. Kaiser knew someone who might have been interested. Ultimately, it didn't go anywhere. We are mostly looking to just get from him Mr. Kenner's admission that he was the owner of this company at the time.

MR. HALEY: May I have a moment, judge. I'm trying to make sure. I am led to believe that there is an allegation that some of the GSF funds that went through the Ron Richards account went to Phil Kenner. I believe that is an allegation.

THE COURT: I think the allegation is, it went to the tequila company. Right?

MR. MISKIEWICZ: Yes.

MR. HALEY: Is the government's proffer that the money was wired directly into the tequila company account?

MR. MISKIEWICZ: Mr. Richards was handling all the disbursements out of the Ron Richards escrow account.

THE COURT: So it went from the Ron Richards account to another?

MR. MISKIEWICZ: To the tequila company account.

- These were complete lies to the Court and no proof was ever presented, yet again...the email referenced by Michiewicz was 16+ months before the government claimed Kenner “stole” funds from the GSF to “buy his tequila company”. The impossible logistics did not bother the government, assuming neither the jury nor the Court would figure out their timeline con was backwards by over a year (while no DeLorean was presented to “time travel” and fix their fraud, with defendant Kenner waiting anxiously for the government to call Dr. Emmitt Brown or Marty McFly as their next witness to verify it).

Michiewicz then attempted to tell Kenner that pictures the government put in front of the jury of tequila bottles were manufactured by Kenner – to which Kenner replies (*Tr.4722-23*):

Q. You were asked what if anything about Mr. Kaiser's testimony regarding tequila was false. On page 4150 your answer was:

[Kenner (read back)]: Specifically, everything. In detail, I have never possessed any of those bottles or any similar version of those bottles that

were represented on the government's exhibit on the one-page web page that was designed by a friend of mine. Those bottles have never been manufactured or any similar replica of them.

Q: Do you remember testifying in this trial to that effect?

A [Kenner]: Yes, I do.

Q. And in fact you did possess and manufacture such bottles, didn't you?

A [Kenner]: That is incorrect.

In fact the Kaiser email instructed Kenner to send the bottles to Russia – which they were – but somehow, (***despite the IRS Agent Wayne's and Galioto's theft of the fake bottle from Kenner's Mexico home in 2014***) – Kaiser allegedly ended up with the illegal bottle in the USA. The bottle, which was allegedly sent to him (*actually 2 bottles per his testimony – Tr.1154*) were supposed to go to Russia...but interesting enough, Kaiser still had one (1) of the bottles in New York – six (6) years later. There was no evidence that the bottles were ever sent to Kaiser; including emails, texts, or government subpoenaed FedEx receipts. The government had all of Kenner's FedEx records but none were used to prove Kenner sent the tequila to Kaiser in New York. It was more government proffered fraud – as a Red Herring.

During summation, the government finishes their Red Herring by saying the bottle is real..."***You can touch it. It is a real bottle***" ...SO WHAT?

- It is not anything Kenner produced – specifically not with anyone else's money...EVER!

During the Kaiser testimony, Michiewicz asked Kaiser to confirm his receipt of the tequila bottles at his home in NY. The email that the government produced (***GX-304***) alleging Kenner was seeking some investment thru Kaiser connections referred to a Moscow Russia mailing address for the bottles only; no investment. Why would Kaiser have received anything? *It is not in the email as the government claimed.*

There were nine (9) bottles sent – *and not the same as the bottle from the EDNY courtroom* – sent to the Moscow address by the distillery in Mexico on Kenner's behalf; the bottles manufactured by another tequila company – Don Abraham ("***DA***") (***GX-4508***).

Closing the door on the government fabricated tequila fraud with Kaiser...

Again -- the following was the "real time" text exchange between Kenner and Gaudet (*in Mexico*) who was assisting Kenner at the time with the manufacturer (again, texts not in defendant Constantine's possession pre-trial):

Tequila -- Rojo bottles (no labels) shipped to Russia – NOT NYC...***Kenner responses in RED***

4170	+5262415159 95 Bobby Gaudet	10/22/2008 1:11:31 AM(UTC+0)	Sent	Did you arrange for the tequila shipments per johnny's email??
3436	+5262415159 95 Bobby Gaudet	10/22/2008 3:28:44 AM(UTC+0)	Read	Do we know what bottles/labels. Blanco ,rep, anj.
4173	+5262415159 95 Bobby Gaudet	10/22/2008 9:45:02 AM(UTC+0)	Sent	No labels. Just DA bottles with 3 of each...blanco, repo, & anèjo. Pk
3438	+526241515995 Bobby Gaudet	10/22/2008 9:49:21 AM(UTC+0)	Read	Bueno

There was ***NO EVIDENCE*** presented in trial or anywhere in the voluminous Government discovery production that instructs &/or indicates that the alleged bottles were EVER sent to New York from a distributor in Mexico (*or any how*)...

- A Mexico distributor would certainly know the shipping laws...regarding alcohol being sent to the USA – and specifically bottles not being shipped to a US distributor.
- In fact – the Cyrillic information that was presented at trial was for the direct distribution with the bottles from Mexico to Russia – and accompanied the bottles. Similar U.S. paperwork would have been required and received by Kaiser if his fabricated story was accurate. Clearly it was his umpteenth act of premeditated perjury on this Court.

Similar False Claims Between The U.S. Attorneys And Kaiser ...

- *The failure by the government to deliver the Kenner texts to Constantine's defense team prohibited them from producing irrefutable impeachment evidence against the government's "star witness"; John Kaiser.*

Despite Kenner's ongoing litigation efforts in the U.S. and Mexico versus Jowdy on behalf of the Hawai'i-Mexico investors, U.S. attorney Michiewicz attempted to persuade the Judge that Kenner berated Kaiser for speaking with the FBI on October 19, 2010 ([Tr.1032](#)):

[Michiewicz]: *"However, we will say that after the [Kaiser] interview was over – and I said it was the FBI. I guess it was a Southern District of New York investigator. When they left the house, he made a call to Kenner, and told Mr. Kenner, in sum and substance, the FBI was here. You should talk to them. He will testify, I'm quoting what he has said – he has a very clear recollection of how Mr. Kenner reacted – he said **"Are you fucking crazy? Did you talk to them?"** And he berated him for talking to them. I am offering this as evidence of consciousness of guilt."*


AUSA Michiewicz' presentation of the pending Kaiser testimony to the court was in full contradiction to the truth (and texts not produced to Constantine's attorneys) – and exactly the opposite of what Berard and Kenner discussed by welcoming the FBI visit – in real time the next day (infra)...

Kenner travelled to Mexico the day of the Kaiser 10-19-2010 FBI interview ([3500-JK-1-r](#)) to work with the investors' criminal attorneys and under Mexico Federal protection, to arrest Jowdy, while waiting on action from the FBI since June 2009 (**Kenner replies hi-lighted in yellow**):

[10-19-2010 – the day of the FBI-Kaiser proffer between Berard and Kenner]:

172 60	+1401524 6929 Bryan Berard*	10/19/2 010 4:09:21 PM(UT C+0)	Read	Get that fucker Jowdy locked up for good down there
103 96	+1401524 6929 Bryan Berard*	10/19/2 010 4:11:39 PM(UT C+0)	Sent	We will get him for sure!

[10-20-2010] – The day after the Kaiser-FBI interview, Berard contacted Kenner in Mexico to discuss it, as follows (**Kenner replies hi-lighted in yellow**):

172 68	+1401524 6929 Bryan Berard*	10/20/2 010 3:36:37 PM(UT C+0)	Read	Hosw Mexico? U get in safe
104 02	+1401524 6929 Bryan Berard*	10/20/2 010 4:12:53 PM(UT C+0)	Sent	So far so good. Tucked away safely!
172 69	+1401524 6929 Bryan Berard*	10/20/2 010 4:20:06 PM(UT C+0)	Read	<u>U hear abt Johnys visit yesterday??</u>
104 03	+1401524 6929 Bryan Berard*	10/20/2 010 4:20:06 PM(UT C+0)	Sent	<u>Yep. I think it's great</u> 
172 70	+1401524 6929 Bryan Berard*	10/20/2 010 4:25:59 PM(UT C+0)	Read	<u>Me too. He was rattled. But I'm glad they</u>
172 71	+1401524 6929 Bryan Berard*	10/20/2 010 4:26:15 PM(UT C+0)	Read	They went and saw him face to face. <u>I wish they wld call me or come see me too</u>
104 04	+1401524 6929 Bryan Berard*	10/20/2 010 4:27:29 PM(UT C+0)	Sent	<u>Soon enough as well. They seemed very uninformed according to johnny!</u>
172 72	+1401524 6929 Bryan Berard*	10/20/2 010 4:30:37 PM(UT C+0)	Read	what's the name of Jowdy's lawyer who was X FBI?? I'm sure he's not giving them any true info at all
104 05	+1401524 6929 Bryan Berard*	10/20/2 010 4:30:43 PM(UT C+0)	Sent	Former FBI director Louis Freeh
172 73	+1401524 6929	10/20/2 010	Read	That's his lawyer right?

	Bryan Berard*	4:32:31 PM(UTC+0)		
104 09	+1401524 6929 Bryan Berard*	10/20/2010 5:36:52 PM(UTC+0)	Sent	Freeh is his criminal attorney for the investigation FBI's visitors were asking about. He has probably looted 1-2mm from the Mexico budget to pay him! It's a joke!
172 75	+1401524 6929 Bryan Berard*	10/20/2010 5:38:52 PM(UTC+0)	Read	Got it. Yup fuckn joke. <u>Hell get his</u>
104 10	+1401524 6929 Bryan Berard*	10/20/2010 5:42:38 PM(UTC+0)	Sent	We have some work ahead of us from what I heard!
172 76	+1401524 6929 Bryan Berard*	10/20/2010 5:44:26 PM(UTC+0)	Read	<u>what u heard is bad??</u> How's things down in Mexico so far?
104 11	+1401524 6929 Bryan Berard*	10/20/2010 5:45:04 PM(UTC+0)	Sent	<u>I just think they need the WHOLE story since they've only really spoken with myrick, Moreau, Nolan, Jowdy, etc. Mexico is good!</u>
172 77	+1401524 6929 Bryan Berard*	10/20/2010 5:46:11 PM(UTC+0)	Read	<u>Great. I agree. Once they talk to us. I think it will switch over</u>

Notwithstanding the fact that Kaiser was Jowdy's co-conspirator at the time of the 2015 trial ([See Document 628](#)) – there is nothing that comports with Michiewicz' proffer to the court about the alleged Kenner-Kaiser conversation of October 19, 2010. The Kenner-Berard communication – *in real time* -- confirms the lack of "[evidence of consciousness of guilt](#)"; not what Michiewicz claimed.

- This was clearly another orchestrated fraud on the Court by the knowing FBI and AUSAs with the same texts in evidence (notwithstanding the ignored truth in the matter).

Only months earlier – exposing his personal knowledge of the Jowdy frauds since 2002, Berard rebuffed Tom Harvey and Jowdy's close friend at the NY Daily News (Michael O'Keefe) for writing multiple slander stories about Kenner, as follows: ¹¹

- These texts were not delivered to Constantine's defense team.

[Kenner (sent) in RED hi-lighted – Berard (reply) in BLACK]:

151 77	+1401524 6929 Bryan Berard*	5/1/2010 12:06:48 AM(UTC+ 0)	Sent	Good job with the reporter. Who was it?
131 85	+1401524 6929 Bryan Berard*	5/1/2010 12:11:12 AM(UTC+ 0)	Read	<u>The douchebag from daily news. Told him he's an idiot for printing these articles and he can quote me that I've been to both properties over a dozen times and Jowdy has not done his job.</u>
131 86	+1401524 6929 Bryan Berard*	5/1/2010 12:11:34 AM(UTC+ 0)	Read	He shut up right away and said sorry for bothern u. And hung up

- With Berard and Kaiser joined at the hip from 2010 until Kenner's 2015 trial, there was nothing they were apparently not aware of with Jowdy prior to taking their Mexico jobs and abandoning their responsibilities to the Hawai'i partners (with Kaiser as Managing Member since 2007) and Eufora (with Kaiser and Berard – leading the litigation efforts with Giuliani's team). ¹²

¹¹ The court should take note that these NY Daily News stories are the ones proffered by Tom Harvey in his April 2009 extortion email to Kenner's attorney to denigrate Kenner (*Bates Stamp: ED-0003068-69*) (*Ex.9*). The FBI was clearly aware of the extortion threat to Kenner in April 2009 just prior to the bribery offer “to just go along” and Kenner DECLINE in May 2009 (*Bates Stamp: 27888* – from Jowdy's production) [*Ex.Z10*].

- The extortion claim was that the FBI was going to put Kenner in jail *because* “Kenner robbed the investors money to get his 38% interest in Cabo”, which *government-forfeiture-44* (created by Harvey himself) and *government-forfeiture-36* unequivocally prove is untrue.
 - *This is the source of the government's fraud on the Court...*

In 2008 -- O'Keefe wrote “Roger Clemens – American Icon” – and Jowdy and Harvey were prominently featured in O'Keefe's book for their assistance in thwarting the government's perjury case against Clemens (with whistleblower – Brian McNamee payoffs from Jowdy in evidence – *See Bates Stamp: PKHome-0016860*) [*Ex.11*]; stolen by Jowdy from Owen Nolan.

¹² The NY Daily News (November 13, 2013) touted Kaiser and Berard as “*heroes*” for their efforts with FBI Agent Galimoto and featured them in an arrest-day article titled – “**Former NHL Player Bryan Berard and ex-cop help Feds nail two Arizona men in massive fraud**”.

Conclusion...

The exclusion of Kenner's voluminous text messages (totaling nearly 100,000; not starting until July 10, 2007) – from the Rule 16 pre-trial production to Constantine – *prejudiced both defenses individually and in concert*. The exculpatory texts were related to the specific exculpatory period of time that the alleged “concealment” of information was purported by *both* defendants; yet the exculpatory truths of the voluminous texts wholly contradict the prosecutorial theories without ambiguity.

The concept that “*two minds are better than one*” applies here (specifically with Kenner in restrictive pre-trial custody and Constantine free on bail for 24-7 access to defense preparation). The government claimed an overarching conspiracy of multiple-objects, yet they prefer that the defendants received only “enough” pre-trial discovery...and anything else they decided they would have produced under law would be *cumulative (a.k.a. -- an admission of guilt)*.

The unspoken truth is that nothing is *cumulative* to the Kenner texts, because they are unique in their transparency – and cannot be challenged by circumstantial, “*I don't remember*” testimony. *They are the truth in real time – and no lack of memory can oppose them.*

- After Jowdy fired Kaiser ([See Document 628](#)) – Kaiser *cannot* get an audience with the FBI to “rat” on his 2012-2017 co-conspirator, Ken Jowdy!! The court should take note in the irony...Kaiser's “prodigal son” status has been revoked when in opposition to Jowdy's cabal -- which hi-lights the question –

“Who is investigating the investigators?”

- The Court should consider following in DC Circuit Judge Emmitt Sullivan's footsteps – with the instant case echoing the Alaska Senator Stevens prosecutorial ruse by the FBI and Sullivan's recommendation to the Justice Department to “*investigate the investigators*”.
 - The subsequent investigation, recommended by Judge Sullivan, opened Pandora's box and exposed gross ethical and legal malfeasance amongst the government's willing participants. It was a public scar on the system, but it took monumental steps towards restoring confidence in the justice system wrought with pay-for-play graft.
- Investigation in the instant case would run to the top of Mount Olympus; beginning with already exposed “unethical” tactics to behave above the law, diverting attention from the real criminal activity and those who have spent over a decade to cover-up the real crimes.
 - *Justice needs a hero...*

Cumulative...

The government espouses legal defense of their prosecutorial misconduct as if the Court is not paying attention. It echoes the unresolved issues they, themselves, opened by producing [government-forfeiture-44](#) (allegedly 3-weeks after the close of the 6-year pre-trial and 3-month trial), which holds wholly reformatory exculpatory disclosures.

The government has *refused* to produce to the defense and the Court (after multiple in court requests), the back-up communication details between the FBI, the U.S. attorney's office and Jowdy's cabal who produced the **"Kenner apparently did not lie about the loans to Jowdy"** exculpatory evidence (*Forfeiture Tr.66-67*; confirming [government-forfeiture-44](#)).

- Kenner has had several Freedom of Information Act (FOIA) requests *denied* by the U.S. Attorneys office and the FBI offices, claiming they cannot release the same back-up detail that was pre-emptive to the production of [government-forfeiture-44](#), **because** there is an ongoing investigation of Kenner related to these materials. They are email back-ups of information that is far past any statute of limitations of anything related to Kenner. As such, Kenner will be forced to file FOIA litigation versus the two (2) offices to receive the exculpatory information (proving another *Brady* violation), only long after Kenner's release, perhaps when it lacks all value to Kenner while undoubtedly proving more prosecutorial misconduct.
 - *What possible investigation could be ongoing when the government and FBI refuse to prosecute Jowdy and his RICO conspirators for the real embezzlement crimes that Kenner has documented with the government's own production of evidence from the bowels of MDC, under the harshest of conditions (See document 667, Document 653)?*

Instead of realizing that *maybe* Jowdy's attorneys misled them for years about the *real* loans that did *not* result in the Kenner Cabo equity for Baja Ventures 2006 (and their-own [government-forfeiture-36](#), which further proved 100%+ of the Baja Ventures 2006 equity was paid for by unrelated and "untainted" funds)¹³, they

¹³ The government desires to seek a wrongful forfeiture under 18 U.S.C. 981 and 18 U.S.C. 982. Their own [government-forfeiture-36](#) accounting proves that Kenner's two (2) partners in Baja Ventures 2006 contributed \$4.1 million to the Cabo project (thru deposits specifically to Ken Jowdy; the control person), or 65.6% of the capital contributions to the Diamante Cabo purchase in March 2006. **The government has not traced a single dollar of**

continue their perpetual ruse on this Court and the uninformed “other” investors to maintain a conviction that continues to dissolve its own prosecutorial integrity every time more information is raised in front of the Court.

The government defended their-own late production of forensic accounting (*government-forfeiture-44*) by claiming it as *cumulative, only after* the Kenner investors were all berated pre-trial with “*Kenner stole your Hawai'i money*” claims from the FBI agent (and spread by Kaiser, Berard and other Jowdy cabal members who were viewed above reproach – according to Kristen Peca's 2012 FBI recordings – *See Document 675 at 137-139, Kenner sentencing memo at 63-64*).

The Court is well-aware that the government called Kenner's in-trial confirmation of the *government-forfeiture-44* loans to Jowdy...“*bogus*” (*Tr.5708 (2x), 5709*), “*phony*” (*Tr.4597, 4598*) and “*supposed*” (*Tr.5707-5708*) – and the Jowdy thefts simply a “*Kenner cover-up story*”, claiming Kenner “*stole more than \$10 million*” (*Tr.27*), “*bought land in Hawai'i, sold it, took the profit for himself*” (*Tr.29-30*), and “*This is the fraud where the defendants lie to the investors about who's stealing from them, and find a way to steal from them all over again. The defendants tell the investors that a guy in Mexico named Ken Jowdy, stole their money and ran away with it*” (*Tr.31*), “*and to fund a tequila company he was starting in Mexico*” (*Tr.33*).

- If *Government-Forfeiture-44* is *cumulative (as the government defended post-trial)*, then the government and Court must be condoning the ignorance by the prosecutorial team of all the alleged *cumulative*, empirical evidence they *needed to reject* in order to construct their false trial narrative of “*stolen by Kenner*” (not Jowdy).
 - With their opening remarks as more frauds on the Court, *supra*.
- Otherwise, “*new evidence*” is present and the fairness and grave responsibility of the prosecution expressed by the Supreme Court in *Berger* (1935) has been constitutionally ignored – and significant revisionary issues are unresolved from an improperly pursued conviction “at all costs”; lacking confidence in the most

“ill-gotten gains” to Kenner for Baja Ventures 2006, or from any illicit source. *That is the government's obligation, and they have failed.*

- The government is again hiding from the fact that (1) Jowdy stole \$1.6 million of the Baja Ventures 2006 capital account funds, (2) was sued by Kenner's partner in Mexico to recover them, and (3) John Kaiser lied about another forgery to assist his 2012-new employer and “sugar daddy” (proven by the 2012 FBI recordings) (*See Document 652*).

critical prosecutorial “object”; and critical reformatory questions of “new evidence” unanswered in the interest of justice. See *United States v. Berger*, 295 U.S. 78 (1935).

Michael Peca’s own texts (absent from the Constantine production) – further highlighted the transparency of the Jowdy loans, openly discussed by the group and the efforts to recover them, as follows (only 7-days before the face-to-face meeting with Peca in Ohio for the GSF). *After* Peca signed on to the 2008-09 Arizona lawsuit¹⁴ to recover the funds from Jowdy for the unpaid Hawai’i loans, Peca wrote to Kenner:

6	+171637	5/1/2009	R	<i>I'll be great when the Hawaii capital accts are paid back.</i> Any news there?
8	43234	3:00:52	e	
4	Michael	PM(UTC	a	
3	Peca*	+0)	d	

Kenner replied clearly about the Jowdy loans and John Kaiser's direct participation in the recompense efforts, with Kaiser the Managing Member of Na'alehu Ventures 2006 (the Hawai’i partners since 2007):

8	+17163	5/1/2009	S	I hear you clearly. Me too. <u>Working on it with john kaiser.</u>
0	743234	3:05:57	e	
3	Michael	PM(UTC	n	
7	Peca*	+0)	t	
8	+17163	5/1/2009	S	Just slowly moving thru the process. We have to get all the other legal hammered out in the meantime. <i>We are making great progress versus Jowdy. That will lead the rest of the deals like the <u>Hawaii loans</u>, etc</i>
0	743234	3:39:08	e	
4	Michael	PM(UTC	n	
0	Peca*	+0)	t	

¹⁴Michael Peca's independent attorney in Arizona offered the following in the 7-page disclosure to Peca and 18 other Hawai’i- Mexico investors in the same litigation ([Ex.12](#)); not turned over by the government to Kenner until post-trial (yet another unresolved *Brady* issue) ([at 1](#)):

“the gist of the lawsuit is to recover certain monies loaned to Mr. Jowdy from Mr. Kenner, Little Isle 4 and Ula Makika LLC. Mr. Kenner estimates the total amount of monies loaned to Mr. Jowdy which have not been repaid to be approximately \$5,000,000. This is the estimated principle only, exclusive of accrued interest. In summary, Mr. Jowdy denies that the monies were loans but rather characterizes them as investments.”

Michael Peca's wife clearly did not know about the loans (concealed by her own husband since 2005 – and confirmed by her-won 2012 FBI recordings of Kenner)¹⁵ when Peca followed up with Kenner:

6	+171637	5/1/200	R	e a d	Get in touch with Glen yet. <u>Also, NT sent an email to my wifes aol acct. Attatched is the transfer info. She's going to f'n loose it when she sees loan paid</u>
8	43234	9			
5	Michael	5:57:01			
1	Peca*	PM(UT C+0)			

Secondly, Constantine was unable to cross-examination Kristen Peca about her fabricated testimony that she received the default letter over a month earlier, after she claimed to the 2015 Court that her “*baby*” was lost (*Tr.709-715*), when she “*signed*” for the default letter (*Tr.709*). The follow-up cross-examination, and her underlying fabrication of knowledge, was unavailable to Constantine without the texts (fully prejudicing the conspiracy defense), because Kristen Peca was living in Ohio when the default letter that Kenner “specifically gave her a heads-up” (*See GX-2115, GX-2116*), was delivered exclusively to their home address in New York; *never Ohio*. *It was an unchecked fraud that Constantine's defense could not defend.*

This was in concert with the texts that confirmed Michael Peca spoke independently with Northern Trust bankers about his default and seizure plans, as follows (**Kenner sent in YELLOW**):

7	+171637	4/1/2009	S	e n t	A Northern trust person will Call you to confirm your transfer to Schwab. Please acknowledge. Keep the call short. NT is the enemy
4	43234	10:38:15			
1	Michael	PM(UTC			
5	Peca*	+0)			
6	+171637	4/1/2009	R	e a	What #? And why r they the enemy. Seems a little dramatic.
3	43234	10:39:44			
2	Michael	PM(UTC			

¹⁵ *Kristen Peca – Well, I was referencing the earlier stuff that you said, I don't remember a large amount being distributed back to our account and the timing of the years of the loan, the line of credit, that happened when we were in Ohio [2008 & 2009]. I don't understand how it could have been open for 5 years before that? Because we had a bond account going. Do you mean the Hawai'i; you had a line of credit, but not for us?*

Kenner – No, no, you guys had lines of credit for 5 years at Northern Trust.

Kristen Peca – for 5 years?

Kenner – for 5 years! When you were in OHIO [2009], that's when the thing [LOC] closed.

3	Peca*	+0)	d	
7 4 1 7	+171637 43234 Michael Peca*	4/1/2009 10:40:55 PM(UTC +0)	S e n t	They refused to deal appropriately with me for us after the Nolan attys corrupted them. Made the ccount management impossible. It will be a 602#. Probably Catherine Brill. Thx
6 3 2 5	+171637 43234 Michael Peca*	4/1/2009 10:44:43 PM(UTC +0)	R e a d	Got it. <u>Call already done</u> . Was this the plan b/c it makes sense to pay the line off or b/c the the loan defaulted? Honestly
7 4 2 0	+171637 43234 Michael Peca*	4/1/2009 10:45:12 PM(UTC +0)	S e n t	100% better to pay off!
6 3 2 6	+171637 43234 Michael Peca*	4/1/2009 10:47:24 PM(UTC +0)	R e a d	Ok. Let's get this done soon. Also, <u>on top of the line I had towards Hawaii, I also had \$200k cash in too</u> . Correct.

Even before Michael Peca re-canted ([Tr.498-99](#)) and confirmed that he was part of the “[group](#)” decision to loan funds to Jowdy from the Hawai'i capital accounts, Constantine could have cross-examined Peca about his explicit text knowledge of the collateral seizures and his unobstructed access to the Northern Trust bankers.

- The court should note that these interactions occur after the time that Owen Nolan and Kenner were embroiled in arbitration in Arizona, with Michael Peca a close friend of Nolan ([Tr.431-32](#)). Michael Peca clearly sided with Kenner, having full access to Nolan, his attorneys, and Jowdy's attorneys, who were all claiming (per Tom Harvey's extortion email – [Ex.9](#)) that Kenner “[stole their funds from Hawai'i with the fake Jowdy loans to buy his equity in Cabo](#)”.

When Kristen Peca claimed to the EDNY court they could not find Kenner for months at a time ([Tr.712-713](#)), she was planning a family vacation with Kenner in Arizona at Kenner's home ([Bates stamp: PK_SEC_005477](#)), and the same day, Kenner and the Pecas (whomever was receiving the family emails) discussed Jowdy's lies during his arbitration testimony about the Hawai'i loans being “investments” ([Bates stamp: PK_SEC_005297 -- Ex.13](#)). This echoed Jowdy's attempted defense lies in the Arizona case (*See footnote 14, supra*), and the partially answered and re-canted lies to the FBI ([3500-KJ-2 at 13](#)) about the same, “investments” not “loans”.

[Government-forfeiture-44](#) has proven that it was a 100% hoax, along with every other Jowdy-Harvey cover-up scheme since Kenner whistle blew on their discovered frauds in 2006 ([See Document 667](#)). It began 8-years before trial (in 2007 by Harvey and Jowdy – [Ex.9](#)) and was fully disproven. John Kaiser's February

2019 “*shocking letter*” (*See Document 628*) re-confirmed everything Kenner testified about at trial and was called a liar “about everything” (*Tr.4597, 5064-65*). Nevertheless, the government, anxious for an “aha” moment and “smoking gun” that never existed, they echoed Harvey’s 8-year-old fraud (while working daily in the EDNY courtroom with Harvey throughout the trial).

The missing exculpatory texts from Constantine's Rule 16 production, coupled with the 1-TB hard drive (*supra*) that was never delivered to Kenner pre-trial, should give this Court more than a momentary pause for concern that everything is not as it seems.

Submitted September 19, 2019

Phil Kenner

Phil Kenner